

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Other Publications

Faculty Scholarship

2020

New Environmental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration

David M. Uhlmann

University of Michigan Law School, duhlmann@umich.edu

Available at: <https://repository.law.umich.edu/other/163>

Follow this and additional works at: <https://repository.law.umich.edu/other>



Part of the [Criminal Law Commons](#), [Environmental Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Uhlmann, David M. "New Enviromental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration." *Environmental Crimes Project* (2020): 1-16.

This Report is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Other Publications by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NEW ENVIRONMENTAL CRIMES PROJECT DATA SHOWS THAT POLLUTION PROSECUTIONS PLUMMETED DURING THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION

*David M. Uhlmann**

The latest data from the Environmental Crimes Project at the University of Michigan Law School shows a dramatic drop in pollution prosecutions during the first two years under President Donald J. Trump. The data, which now includes 14 years of cases from 2005–2018, shows a 70 percent decrease in Clean Water Act prosecutions under President Trump, as well as a more than 50 percent decrease in Clean Air Act prosecutions. The data again shows that most defendants charged with pollution crime commit misconduct involving one or more of the aggravating factors identified in my previous scholarship,¹ so prosecutors continue to reserve criminal prosecution for conduct involving those aggravating factors and rarely prosecute when none of those factors is present. The significant drop in the number of defendants prosecuted, however, raises questions about the extent to which broader changes at the Environmental Protection Agency and the Justice Department may be having a negative impact on the federal environmental crimes program, which historically received support under Democratic and Republican presidents, regardless of their environmental policies.

INTRODUCTION

When I served as the top environmental crimes prosecutor at the Justice Department from June 2000 to June 2007, I often commented that the rumors of the demise of the environmental crimes program were greatly exaggerated. The alarm bells began sounding not long after I joined the Justice Department in 1990, with claims that political appointees under President George H. W. Bush were thwarting environmental prosecutions. Three Congressional investigations ensued, pitting United States Attorneys against their counterparts in Washington and doing more damage to the environmental crimes program than any nefarious political appointee could have mustered.²

* Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. I am indebted to Evan Neustater, Brian Schaap, and Maria Smilde for drafting portions of this article and for their work, along with Marlee Goska, providing research assistance and supervising data collection. I also am grateful to the more than 350 Michigan Law students who have participated in the Environmental Crimes Project (ECP) since its inception in 2010.

¹ See David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 4 UTAH L. REV. 1223 (2009); David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL L. REV. 159 (2014); David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005–2014*, 8 MICH. J. ENVTL & ADMIN. L. 297 (2019).

² Uhlmann, *Prosecutorial Discretion and Environmental Crime*, *supra* note 1, at 171-172 and accompanying footnotes (describing dysfunctional relationships between the United States Attorney's

Within a few years after the Bush administration ended, his presidency became the halcyon days for pollution prosecutions, with news reports stating that the number of prosecutions had dropped precipitously under President William J. Clinton. Similar news stories occurred under President George W. Bush from 2001 to 2009 and re-emerged under President Barack Obama from 2009 to 2017. If those reports all were true, as I remarked during my tenure as Chief of the Environmental Crimes Section, there would have been no environmental crimes program left. Yet, by the time I left the Justice Department, the number of environmental prosecutors had grown to 40 attorneys in Washington, D.C. with an annual caseload of more than 200 active matters—and those staffing and work levels remained throughout the tenure of my successor.

Toward the end of the Obama administration, the number of pollution prosecutions began to drop, tumbling from a high of 191 defendants during 2011 to 106 defendants three years later in 2014. Those decreases probably were attributable to declining agent resources at EPA³ and not a loss of support for the environmental crimes program, which has received consistent, non-partisan support since the creation of the Environmental Crimes Section in 1987 during the second term of the Reagan administration.⁴ Still, the decline was jarring, with pollution prosecution levels sagging to their lowest levels in a decade, according to data developed by the Environmental Crimes Project (ECP) at the University of Michigan Law School. While 2014 marked the low point, the numbers improved only slightly in 2015 and 2016, so that the average number of pollution prosecutions brought each year under President Obama was lower than the annual average during President Bush's second term.⁵

Then under President Donald J. Trump the bottom fell out, with just 90 defendants prosecuted during 2017, and 75 defendants prosecuted during 2018. The decline in Clean Water Act prosecutions under President Trump was particularly troublesome, dropping by 70 percent from what they had been under President Obama (who prosecuted fewer Clean Water Act cases than President Bush). The Trump administration also brought dramatically fewer Clean Air Act prosecutions—less than half of what occurred during the Obama administration and a nearly 40 percent drop from the Bush administration—although the Trump administration has brought slightly more hazardous waste cases under the Resource Conservation and Recovery Act.

Offices, the Environmental Crimes Section, and EPA's Criminal Investigation Division, as well as Justice Department internal review and committee reports from multiple Congressional hearings).

³ Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux*, *supra* note 1, at 312-13.

⁴ See, e.g., David M. Uhlmann, *Strange Bedfellows*, ENVTL. FORUM, MAY-JUNE 2008 at 40, 40-44 (describing support for environmental prosecutions during George W. Bush administration despite overall weakness of the administration's record on other environmental protection issues and arguing that criminal enforcement under the environmental laws receives broad support across presidential administrations). As for the Obama administration, the prosecution of 191 defendants in 2011 was the highest number during any administration in the 14 years of ECP data. There is no indication that the Obama administration subsequently soured on criminal enforcement—and substantial evidence of fewer investigative resources. See Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux*, *supra* note 1, at 312-13.

⁵ I reference only the second term of the Bush administration because ECP does not include prosecutions initiated before January 2005. ECP data analysis starts in January 2005, because EPA changed its case management system then and is more able to attest to the completeness of the case lists it provides ECP for analysis. See Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux*, *supra* note 1, at 305.

The record low numbers from the first two years of the Trump administration may come as no surprise after President Trump campaigned on a promise to reduce EPA to “teeny tiny tidbits”⁶ and after his EPA pursued more than 100 rollbacks of environmental and public health protections.⁷ The seeming lack of support for pollution prosecutions also may track the larger narrative about how the Justice Department under President Trump and Attorney General William Barr has politicized criminal enforcement in ways that prior administrations—both Democratic and Republican—scrupulously sought to avoid. Broader narratives aside, however, the trend-line of far fewer pollution cases may raise questions about the future of criminal enforcement under the environmental laws.

The newest data is more positive with regard to the core qualitative question addressed by ECP, namely how prosecutors exercise their discretion in the environmental context. In my prior scholarship, I have argued that prosecutors would meet their obligation to do justice—and have better success at trial—if they limited criminal enforcement to cases where aggravating factors were present that justified treating the violation as criminal. Based on my prosecutorial experience, I identified significant harm, deceptive or misleading conduct, operating outside the regulatory system, and repetitive violations as aggravating factors.⁸

From 2005–2014, I determined that 98.7 percent of all defendants charged committed violations that involved at least one aggravating factor, which led me to conclude that one or more aggravating factor was present in nearly all environmental prosecutions and that violations that did not involve aggravating factors were unlikely to result in criminal charges.⁹ When I expand the data to include 2005–2018, the percentages remain largely consistent, with 97.3 percent of all defendants engaging in misconduct that involved at least one aggravating factor. There is a small drop-off during the first two years of the Trump administration, where only 96 percent of the defendants committed misconduct that involved at least one of my aggravating factors. But it would be premature to suggest a significant shift in how prosecutors are exercising their discretion given the limited number of cases prosecuted during the Trump administration and the fact that we have only two years of data under President Trump.

In this article, I present the latest ECP data, which now includes the second term of the Bush administration, both terms of the Obama administration, and the first two years of the Trump administration. Part One provides our first-ever analysis of prosecution levels by administration to allow consideration of the extent to which criminal enforcement under the environmental laws is non-partisan and how it might vary across administrations. Parts Two and Three explore the decrease in Clean Water Act and Clean Air Act prosecutions during the first two years of the Trump administration.

⁶ See Brady Dennis et al., *With a Shrinking EPA, Trump Delivers on His Promise to Cut Government*, WASH. POST, Sept. 8, 2018, https://www.washingtonpost.com/national/health-science/with-a-shrinking-epa-trump-delivers-on-his-promise-to-cut-government/2018/09/08/6b058f9e-b143-11e8-a20b-5f4f84429666_story.html.

⁷ See Nadja Popovich et al., *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, July 15, 2020, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html>.

⁸ Uhlmann, *Environmental Crime Comes of Age*, *supra* note 1, at 1245-1252.

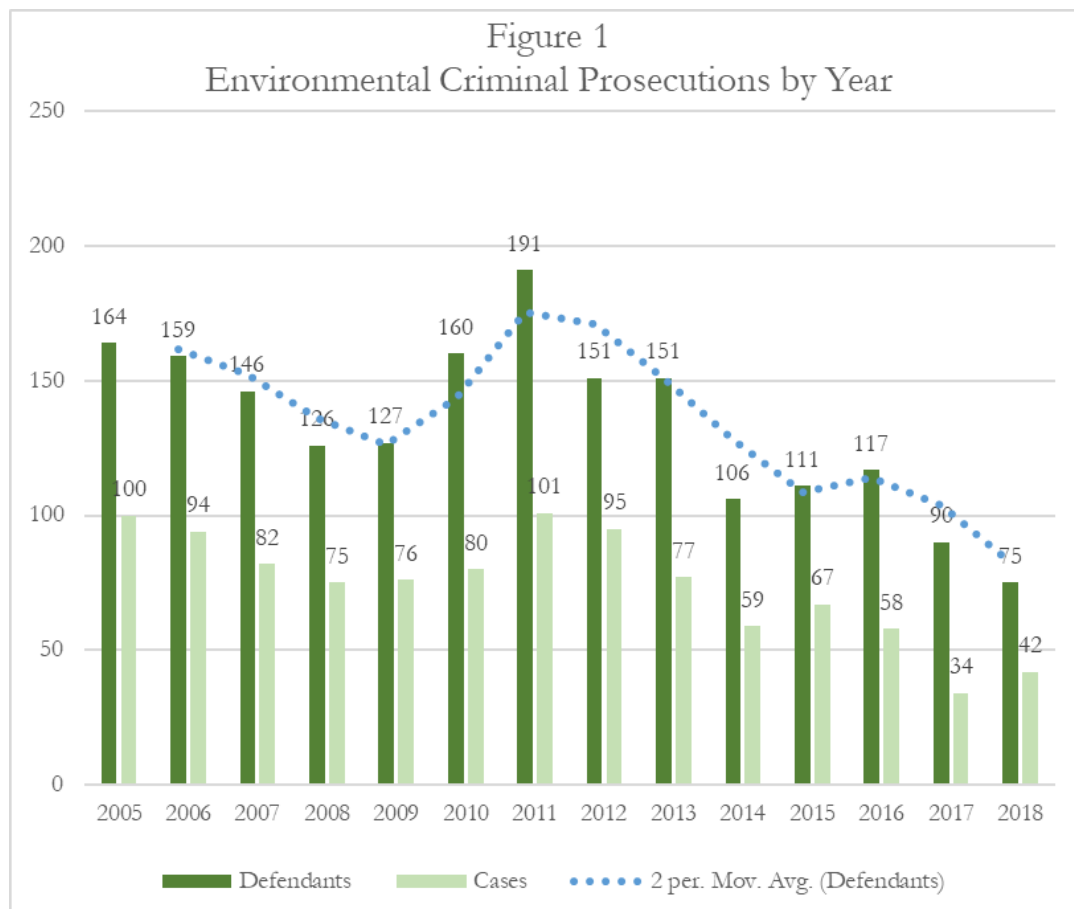
⁹ Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux*, *supra* note 1, at 330.

Part Four offers an update of the aggravating factor analysis, where we again determined that most violations charged criminally involved one or more aggravating factors, although there has been a slight decrease in their presence under President Trump.

PART ONE: ANALYSIS OF OVERALL PROSECUTION LEVELS BY ADMINISTRATION

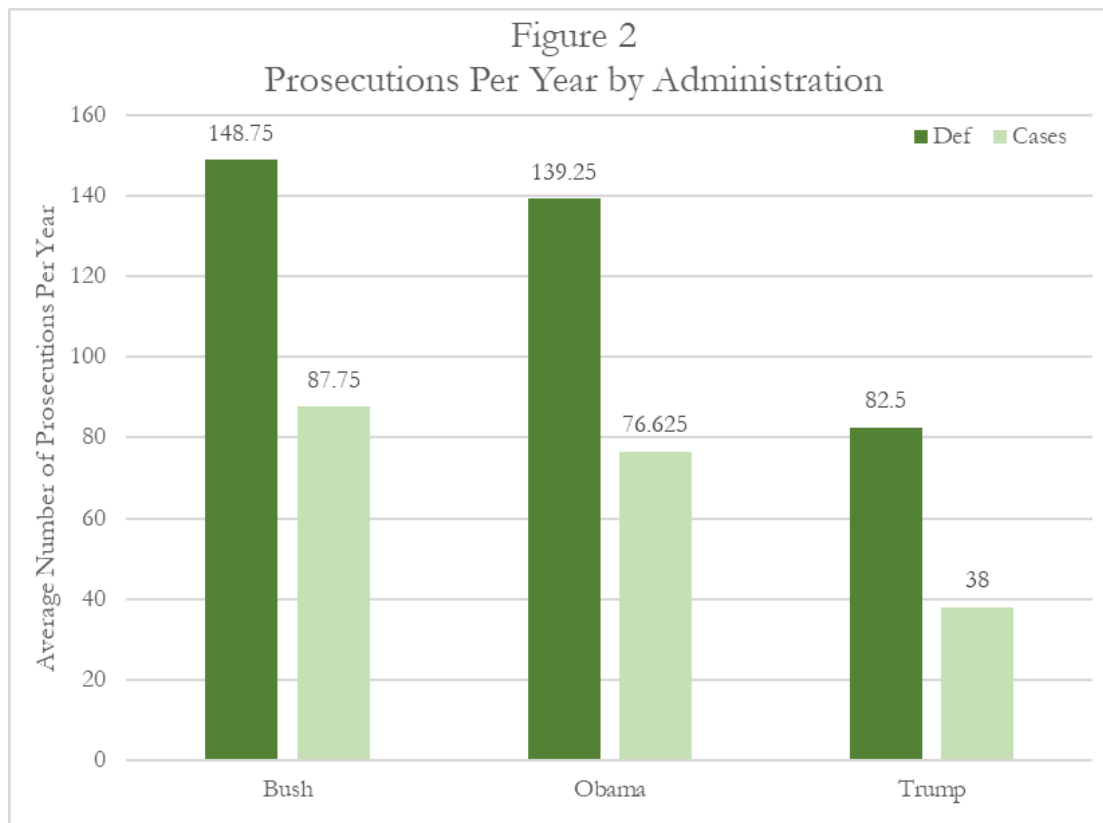
ECP now includes 14 years of pollution prosecution data covering 2005–2018. Notably, there were yearly variations throughout the Bush and Obama administrations, with prosecution numbers dropping by more than 20 percent over the last three years of President Bush’s second term, from 164 defendants in 2005 to 126 defendants in 2008. The yearly variations were even greater under President Obama, increasing by nearly 50 percent from 127 defendants in 2009 to 191 defendants in 2011, dropping by more than 40 percent to 106 defendants in 2014, and then increasing again by about 10 percent to 117 defendants in 2016.

But despite the significant shifts in prosecution levels that occurred during the Bush and Obama administrations, overall prosecutions never fell below 100 defendants. That ignominious distinction belongs to President Trump alone, whose administration saw prosecution levels tumble to 90 defendants in 2017 and 75 defendants in 2018, the latter nearly 40 percent below the last year under President Obama. Figure 1 below shows the number of pollution crime defendants and cases each year from 2005–2018:



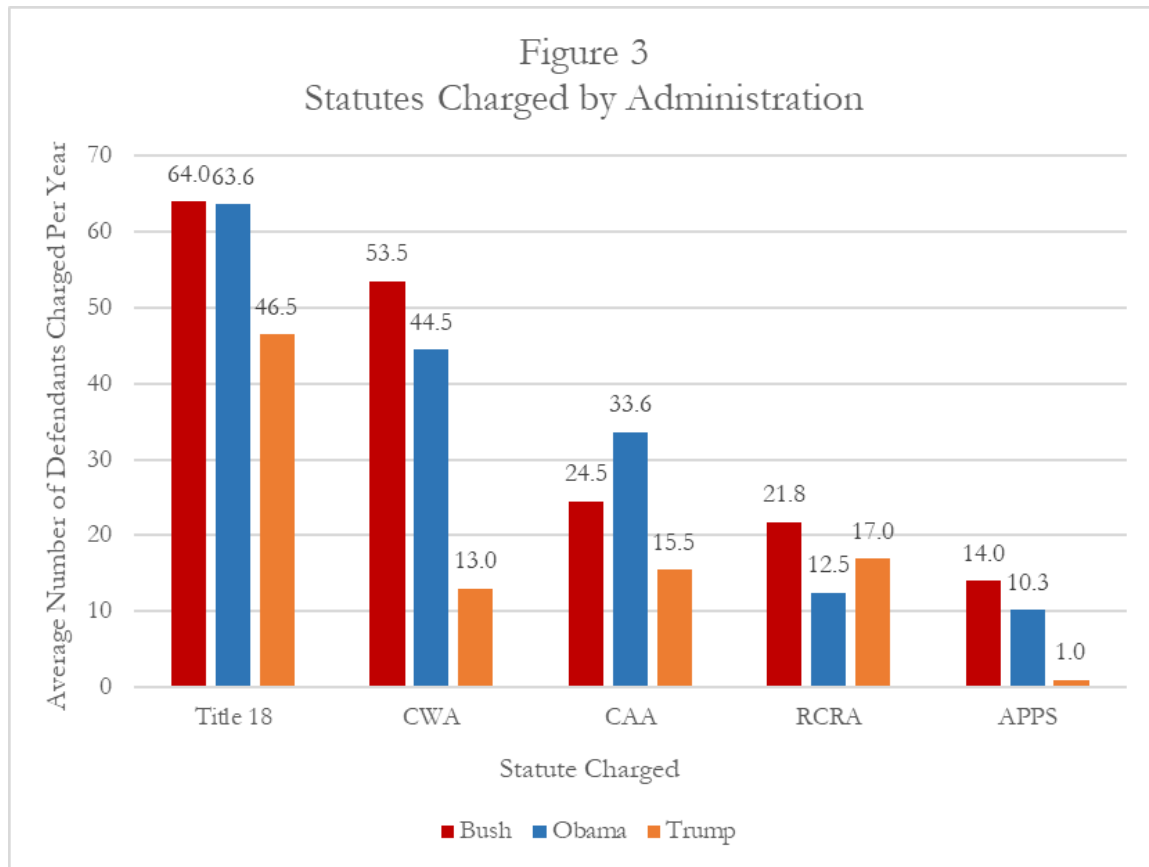
The low watermark of 75 defendants in 2018 under President Trump is nearly 30 percent lower than the lowest year during the Obama administration (106 defendants in 2014) and 40 percent lower than the lowest year during the Bush administration (126 defendants in 2008). Nor are the numbers better when we consider overall cases, rather than defendants. The Justice Department filed charges in just 34 cases during 2017 and 42 cases during 2018, both the lowest numbers in our dataset. The smallest number of cases under President Bush was 75 cases in 2008—more than twice the number of cases during the first year of the Trump administration in 2017; the smallest number of cases under President Obama was 58 cases in 2016—nearly 40 percent more than during 2017.

Yearly variations in prosecution levels occur often in the environmental crimes program, because of its relatively modest staffing levels, so we also examined average prosecution levels across administrations to offset the effect of potential outlier years. Here the small size of our dataset under President Trump limits the degree to which averaging compensates for outlier years, a challenge made greater by the fact that 2017 and 2018 were major outliers. Nonetheless, average annual prosecution levels by administration also dropped dramatically during the first two years of the Trump administration, with a nearly 45 percent decrease in the average number of defendants prosecuted compared to the second term of the Bush administration, and a more than 40 percent drop compared to both terms of the Obama administration. Figure 2 below shows average prosecutions per year by presidential administration:



The decreased average prosecution levels are even more significant when the comparison is made based on average case numbers, rather than by defendants. The average number of pollution cases brought each year by the Trump administration was less than half the number brought during the Bush and Obama administrations.

Our dataset also reveals significant shifts in which statutes prosecutors charged in pollution prosecutions. While there were differences between the Bush and Obama administrations—most notably higher Clean Water Act prosecution levels under President Bush and higher Clean Air Act prosecutions levels under President Obama—both pursued significant numbers of prosecutions under these two key environmental laws. In the first two years of the Trump administration, the emphasis on Clean Water Act and Clean Air Act prosecutions evaporated, with only Title 18 levels remaining within the range of prosecution levels seen during the previous administrations. RCRA hazardous waste charges rebounded under President Trump, but prosecutions under the Act to Prevent Pollution from Ships—a priority under both prior administrations—all but disappeared.¹⁰ Figure 3 below shows statutes charged by Administration:



¹⁰ Since 1995, the Justice Department has led a vessel pollution initiative in partnership with the Coast Guard and EPA. The Coast Guard has lead responsibility for vessel pollution matters; EPA always has played a supportive role, focusing mostly on providing assistance in larger cases. With limited agent resources, EPA may have determined that it can no longer devote agent resources to vessel pollution cases, which would be a legitimate exercise of its investigative discretion. But I would expect to see higher case numbers in other areas as a result, which, other than the increase in RCRA cases, has not occurred.

We analyze in more detail the decreases in Clean Water Act and Clean Air Act cases during the Trump administration in Parts Two and Three below. Before we do, a few points merit emphasis. First, as noted above, the fact that we have only two years of data for the Trump administration increases the impact of outlier years. Second, because of the time it takes to investigate pollution cases (typically at least 12–18 months and often longer), lower charging numbers at the start of the Trump administration might be attributable at least in part to a decline in new investigations during the last year of the Obama administration. Third, downward shifts in case numbers often occur when agent resources are depleted, which was a major issue during the first two years of the Trump administration because EPA special agents were diverted from investigative work to provide a security detail for EPA Administrator Scott Pruitt. These factors might help explain the lower case numbers under President Trump in ways that would have been outside the control of his administration, with the notable exception of the security detail, which may not have been an appropriate use of limited special agent resources.

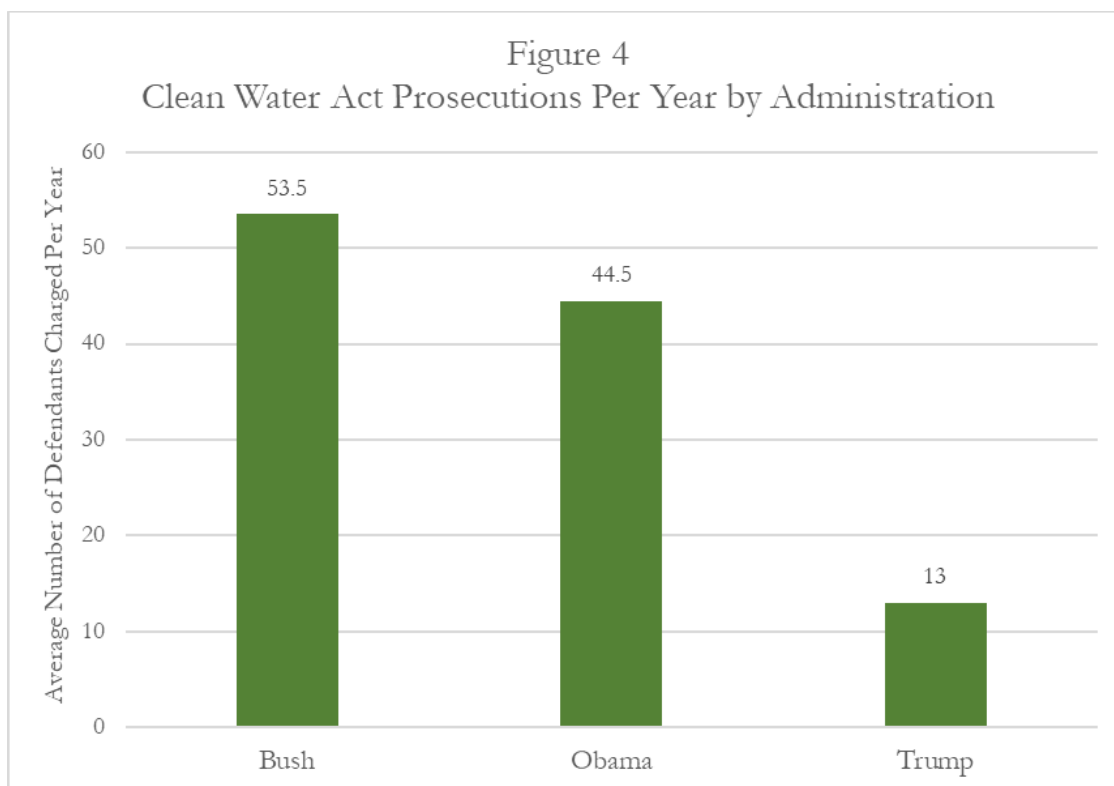
We will be in a better position to analyze the significance of the downturn at the start of the Trump administration once we are able to include data from 2019 and 2020, which we will analyze starting in 2021.¹¹ Stronger prosecution numbers for 2019 and 2020 might mitigate the low prosecution numbers from 2017 and 2018, although based on a review of fiscal year data maintained on EPA’s website, it appears the historically low prosecution levels under President Trump have persisted throughout his term.¹²

PART TWO: DECLINE IN CLEAN WATER ACT PROSECUTIONS

The decline in Clean Water Act prosecutions during the first two years of the Trump administration is the most significant departure from prosecution levels during the Bush and Obama administrations. The average number of Clean Water Act defendants charged per year during 2017 and 2018 shows a 76 percent decrease from the second term of the Bush administration (falling from 53.5 defendants to 13 defendants per year) and a 71 percent decrease from the two terms of the Obama administration (decreasing from 44.5 defendants to 13 defendants per year). Our data already showed a modest drop in Clean Water Act prosecutions during the Obama administration. But during the first two years of the Trump administration, the number of Clean Water Act prosecutions crumbled. Figure 4 below shows average Clean Water Act prosecutions per year:

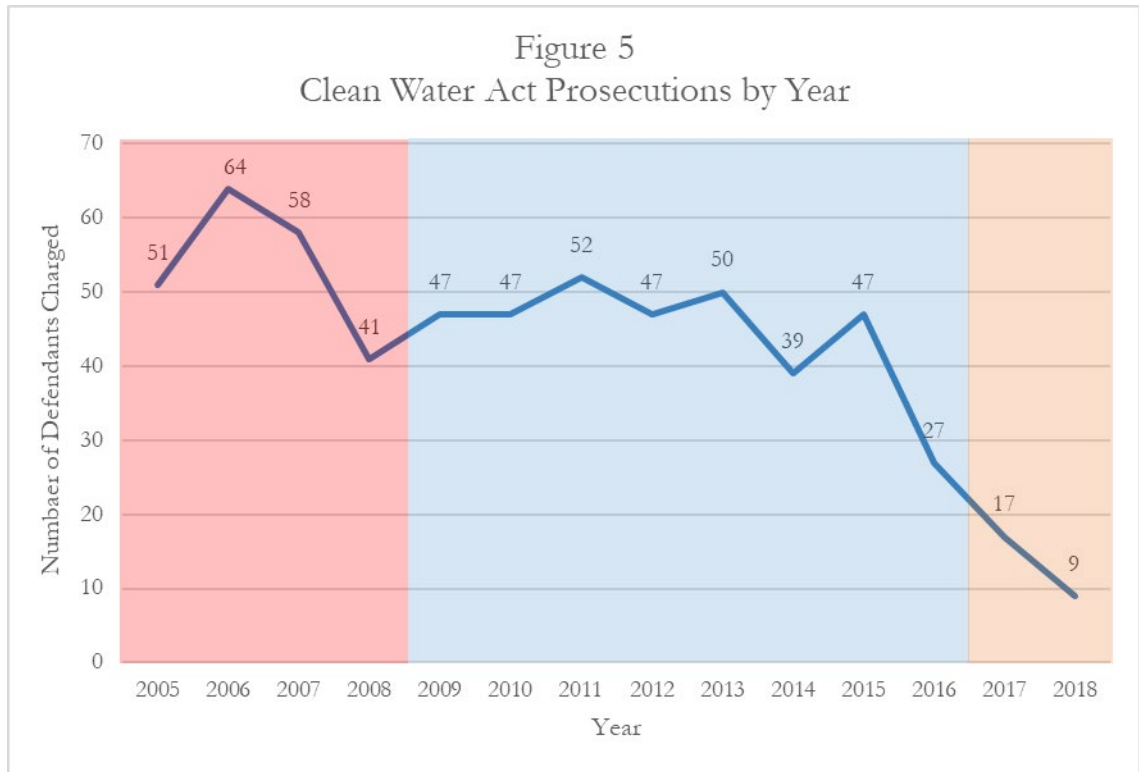
¹¹ ECP receives case data from EPA every two years, so we will not have 2019 and 2020 data until early in 2021. We will begin analyzing that data immediately, although the comprehensive analysis that we do often requires two semesters to complete, a timeline that may be longer during the COVID-19 pandemic.

¹² Unlike ECP, which collects data based on the calendar year that the Justice Department brings charges, EPA’s website maintains data based on fiscal years. See Summary of Criminal Prosecutions, <https://www.epa.gov/enforcement/summary-criminal-prosecutions> (last checked October 1, 2020). A search using the EPA Summary of Criminal Prosecutions shows 87 prosecutions during 2017, 63 prosecutions during 2018, 71 prosecutions during 2019, and 61 prosecutions during 2020, which suggests that the historic lows during the first two years of the Trump administration were not anomalous.



It is hard to overstate the significance of the decrease in Clean Water Act prosecutions during the Trump administration. Historically, the Justice Department prosecutes more criminal charges under the Clean Water Act than any other environmental statute. Yet during the first two years of the Trump administration, the Justice Department charged more cases under the Clean Air Act and RCRA, dropping the Clean Water Act to the third-most frequently charged environmental statute. Nor can we say this is simply a matter of shifting enforcement priorities: the drop is not accompanied by anything approaching an offsetting increase in enforcement under other environmental statutes. As noted in Part One of this article, only RCRA enforcement increased under President Trump, and only by an average of 4.5 defendants per year, nowhere near the average decrease under the Clean Water Act of 31.5 defendants per year.

In fact, the downward trend of Clean Water Act prosecutions during the first two years of the Trump administration is even more apparent when we look at prosecutions by year, rather than averaging across both years. While the Trump administration charged 17 defendants in 2017, it charged only 9 defendants in 2018. Although the number of Clean Water Act prosecutions had begun to drop during the last year of the Obama administration, the trend accelerated dramatically during the first two years of the Trump administration. By 2018, the Justice Department charged Clean Water Act violations for only one third of the number of defendants it charged in 2016 and less than one fifth of the number it charged during 2015. Figure 5 shows Clean Water Act charges by year:



The dramatic decrease in Clean Water Act prosecutions during the Trump administration is noteworthy for reasons beyond the sheer size of the drop. First, there was no change between the Bush and Obama administrations in terms of the most frequently charged statutes. Under both Presidents Bush and Obama, the Justice Department charged the most defendants under the Clean Water Act, the Clean Air Act, RCRA, and the Act to Prevent Pollution from Ships, in that order. In the first two years of the Trump administration, the Clean Water Act dropped from the most frequently charged statute to the third most frequently charged. Second, the Clean Water Act’s straightforward language typically makes it the easiest and most favorable environmental statute to charge for federal prosecutors. The Clean Water Act states that “the discharge of any pollutant by any person shall be unlawful”¹³ except when permitted by EPA or a state environmental regulatory agency.¹⁴ The Clean Water Act therefore lends itself to criminal prosecution far more so than the Clean Air Act and RCRA, both of which are notoriously complex and therefore harder to prosecute.

One possible explanation for the sharp drop in Clean Water Act prosecutions could be uncertainty about the jurisdictional reach of the Clean Water Act. The enactment of the Clean Water Act in 1972 extended jurisdiction from “navigable waters” that were protected under the Rivers and Harbors Act¹⁵ to include all “waters of the United States.”¹⁶ While EPA took the position that waters of the United States included

¹³ 33 U.S.C. § 1311(a) (2018).

¹⁴ *Id.*

¹⁵ 33 U.S.C. § 403 (2018).

¹⁶ 33 U.S.C. § 1362(7) (2012) (defining the statutory term “navigable waters” to include “waters of the United States”).

the entire tributary system and adjacent wetlands, courts often were skeptical of that interpretation, particularly in wetlands cases. In 2006, the Supreme Court issued a plurality opinion in *Rapanos v. United States*¹⁷ that left the law a muddled mess.¹⁸

While we previously concluded that prosecutors were not shying away from Clean Water Act cases because of jurisdictional concerns,¹⁹ perhaps that has changed during the Trump administration. The Trump administration repealed the waters of the United States rule promulgated by the Obama administration in 2015²⁰ and replaced the rule with a narrower definition.²¹ It is possible that the uncertainty created by these dueling rulemakings has left prosecutors wary of bringing new charges under the Clean Water Act, even though most criminal prosecutions under the law involve navigable-in-fact waters and their tributaries, which have not been as controversial as wetlands cases. But there is no escaping the fact that the Justice Department prosecuted dramatically fewer Clean Water Act crimes during the first two years under President Trump.

PART THREE: DECLINE IN CLEAN AIR ACT PROSECUTIONS

The Clean Air Act is one of the most significant environmental statutes from a public health perspective. EPA projects that the overall economic benefits of the Clean Air Act will reach \$2 trillion annually by the end of this year—largely due to its estimated annual prevention of 230,000 premature deaths—and further estimates that these monetized benefits outweigh costs by a factor of 30 to one.²² Historically, civil and administrative actions comprised the majority of Clean Air Act enforcement, but EPA and the Justice Department have long sought to expand criminal enforcement under the Clean Air Act to deter violators and incentivize compliance with the law's requirements.

Efforts to increase criminal enforcement under the Clean Air Act started to reach fruition during the Obama administration, which charged more defendants each year (on average) for air pollution crimes. Overall, the Obama administration charged an average of nearly 34 defendants annually under the Clean Air Act. This represented a 37 percent increase over the Bush administration, which had charged an average of nearly 25 defendants annually under the Clean Air Act. Figure 6 below shows the increase in Clean Air Act cases during the Obama administration—and the dramatic reversal of those efforts during the first two years of the Trump administration.

¹⁷ *Rapanos v. United States*, 547 U.S. 715 (2006).

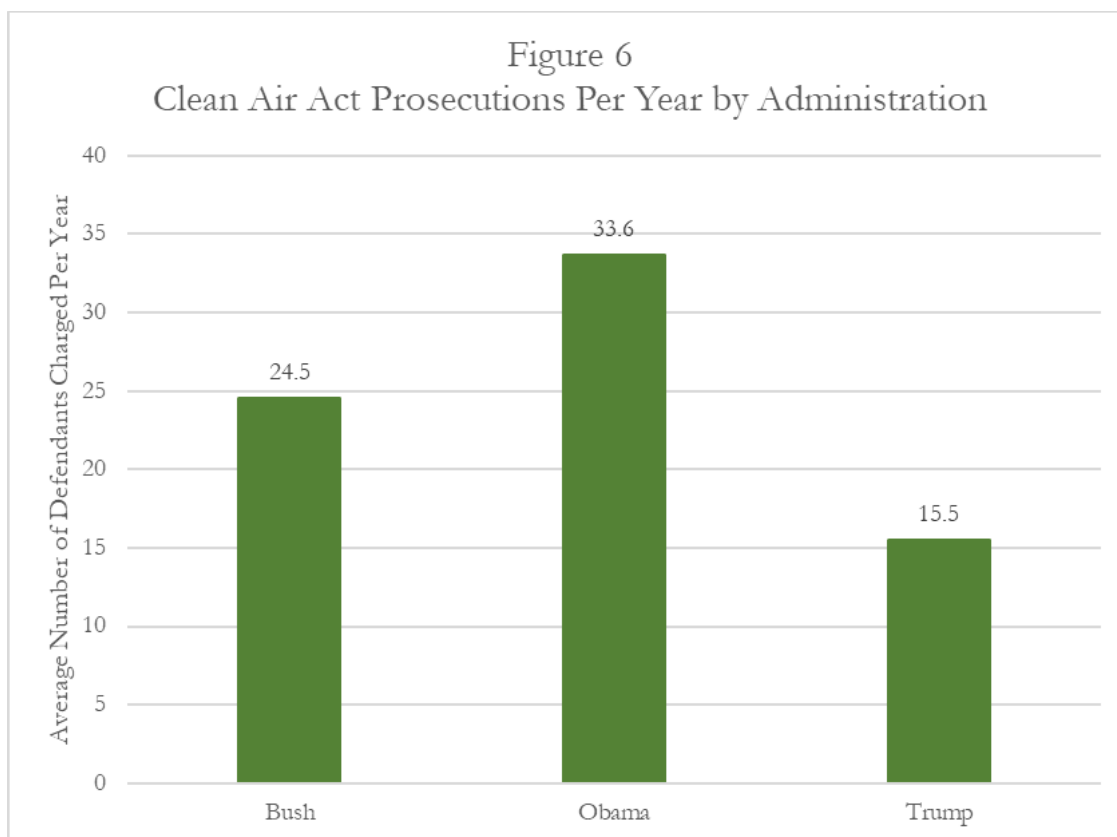
¹⁸ See David M. Uhlmann, Opinion, *Trump Wants to Weaken Clean-Water Rules*, N.Y. TIMES, Dec. 12, 2018.

¹⁹ Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux*, *supra* note 1 at 319-323.

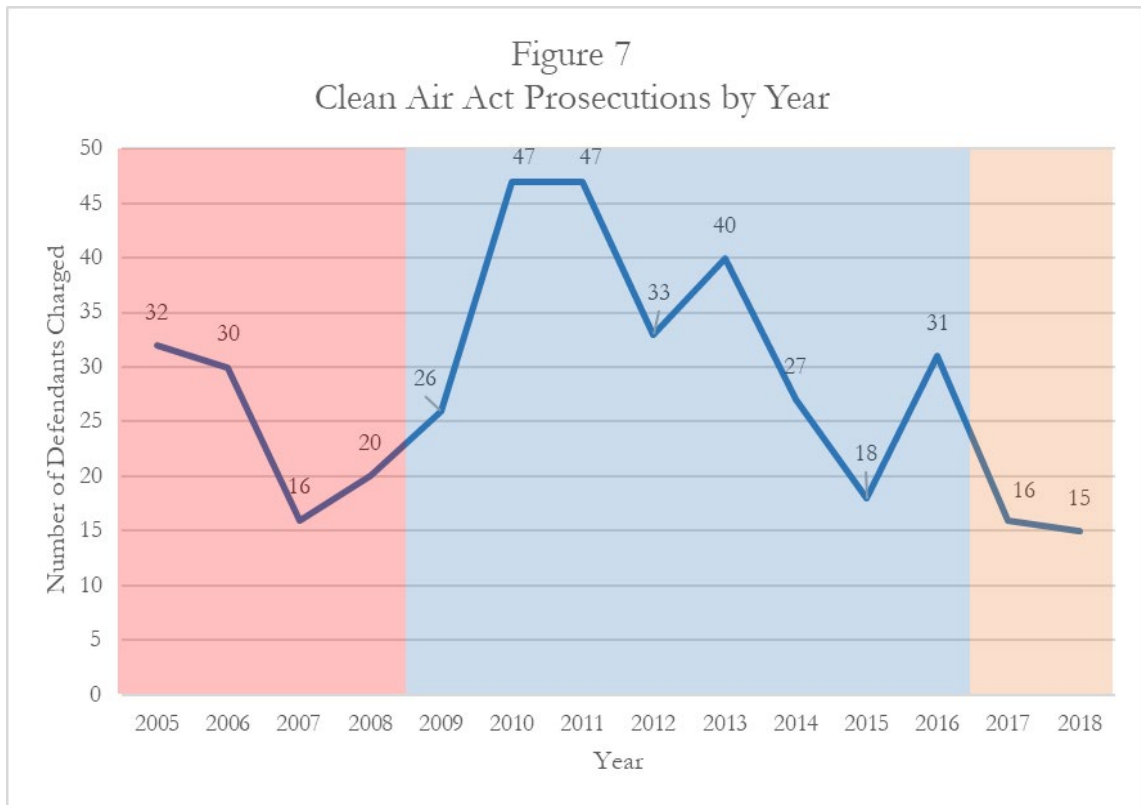
²⁰ Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,053 (June 29, 2015).

²¹ The Navigable Waters Protection Rule: Definition of “Waters of the United States”, 85 Fed. Reg. 22,250 (Apr. 21, 2020).

²² See U.S. Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020: Summary Report* (2011), available at: <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-report-documents-and-graphics>.



A review of Clean Air Act cases by year shows both the extent to which those prosecutions increased during the Obama administration—and the decline that has occurred at the start of the Trump administration. Prosecutions had fallen in the last two years of the Bush administration to 16 defendants in 2007 and 20 defendants in 2008. In the first term of the Obama administration, Clean Air Act prosecutions increased to 26 defendants in 2009 and then surged to 47 defendants each year in 2010 and 2011. While the number of Clean Air Act charges declined early in the second term of the Obama administration, the numbers increased again in the final year of the administration—and in every year except for 2015 exceeded the average number of defendants charged during the Bush administration. Figure 7 below shows Clean Air Act prosecutions by year:

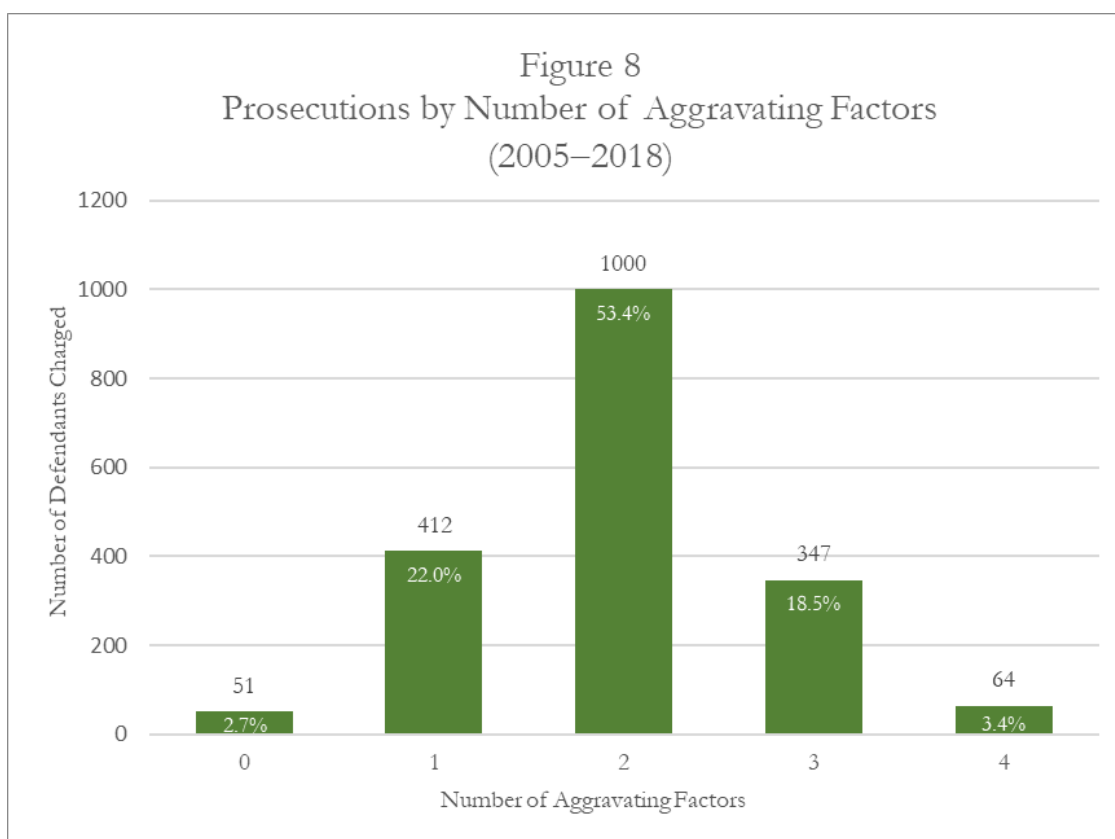


During the first two years of the Trump administration, Clean Air Act charges declined significantly. The Justice Department brought criminal charges against 16 defendants in 2017 and 15 defendants in 2018. The average number of defendants charged annually was thus 15.5, which represents a decline of 54 percent from the eight years of the Obama administration. While Clean Air Act prosecutions have been similarly low in isolated years—under the Bush administration in 2007–08 and under the Obama administration in 2015—in no prior two-year period have Clean Air Act prosecutions dropped as low as during the first two years of the Trump administration.

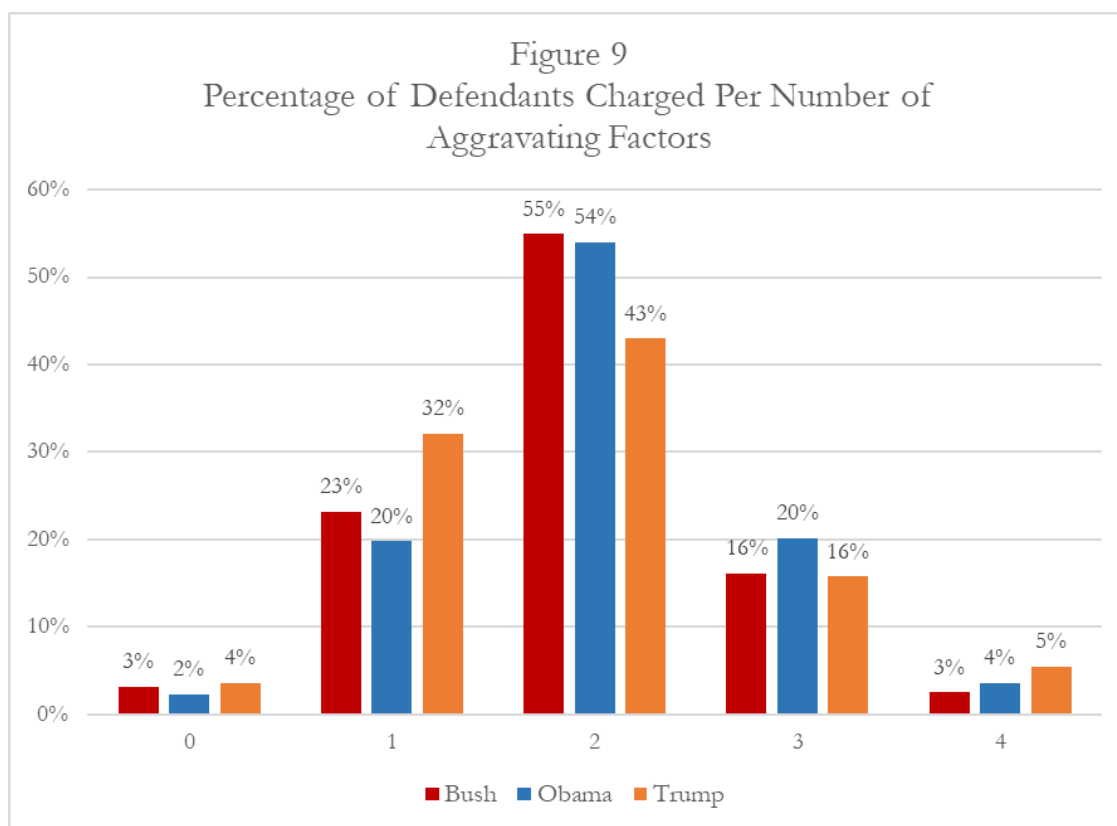
Moreover, the 54 percent decline in Clean Air Act prosecutions at the start of the Trump administration is greater than the overall decline in prosecutions across all environmental criminal statutes during the Trump administration. Our data does not allow us to determine whether this disproportionate decline results from an intentional decision by the Trump administration to bring fewer charges under the Clean Air Act, or from a prioritization of criminal enforcement under other statutes, such as RCRA. I simply would note that the modest increase our data shows in RCRA prosecutions does not come close to offsetting the decrease in Clean Air Act matters—just as it did not offset the even larger decrease we saw in Clean Water Act prosecutions. The data unmistakably demonstrates that criminal enforcement under the Clean Air Act has significantly declined during the first two years of the Trump administration. The data also shows that Clean Air Act criminal enforcement during the Trump administration falls 37 percent below the second term of the Bush administration—a significant decline in the average number of defendants charged across two Republican administrations.

PART FOUR: PERSISTENT PRESENCE OF PROSECUTORIAL DISCRETION FACTORS

Despite the sharp decline in prosecutions for environmental crimes during the first two years of the Trump administration, the Environmental Crimes Project data continues to show the persistent presence of the four aggravating factors I have described in my previous scholarship. Our dataset now includes 1,874 defendants. For 97.3 percent of those defendants, one or more aggravating factors are present; only 2.7 percent of the defendants charged with environmental crimes committed violations with none of the aggravating factors present. In addition, 75.3 percent of defendants committed violations involving multiple aggravating factors. Figure 8 below shows the number of defendants charged by aggravating factors:



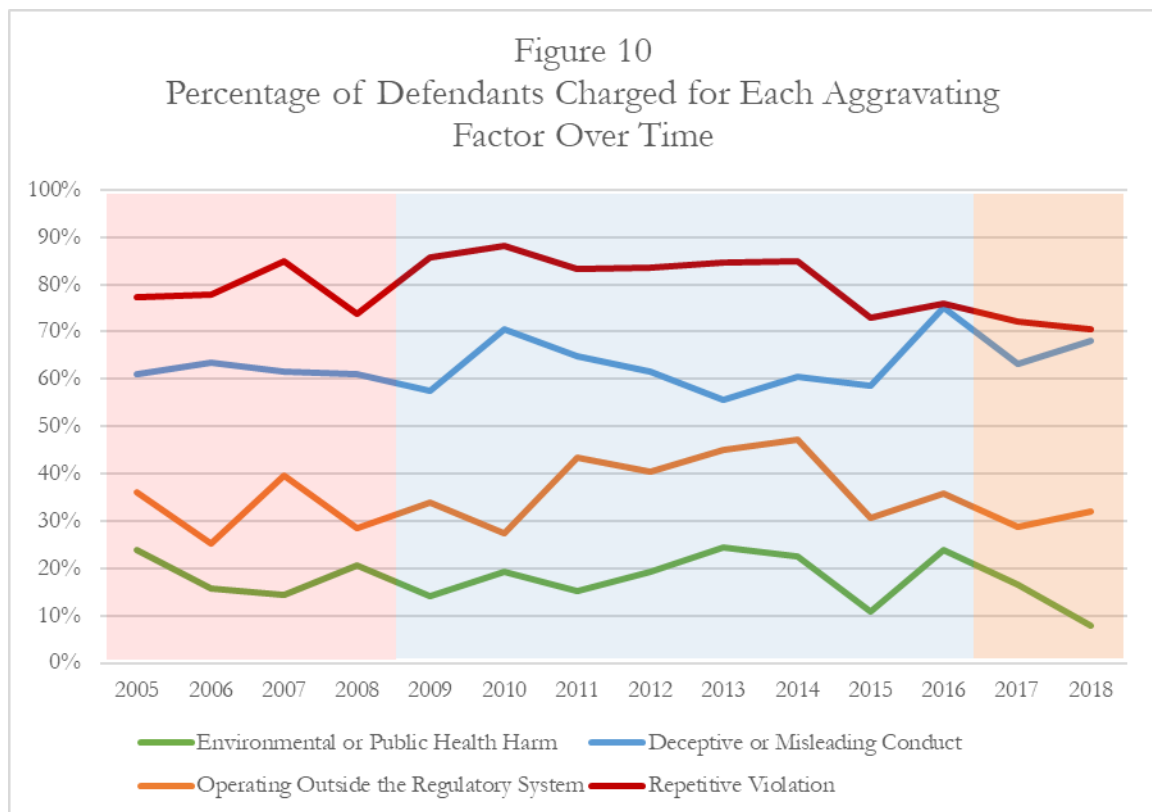
When we compare the presence of aggravating factors across administrations, the data shows some shifts during the first two years of the Trump administration. For the 165 defendants charged during 2017 and 2018, only 64 percent engaged in conduct involving multiple aggravating factors, compared to 74 percent during the second term of the Bush administration and 78 percent during the Obama administration. As a result, the percentage of defendants with violations involving just a single factor rises to 32 percent under President Trump, compared to 23 percent under President Bush and 20 percent under President Obama. In addition, the number of defendants with no aggravating factors present rises to 4 percent under President Trump, compared to 3 percent under President Bush and 2 percent under President Obama. Figure 9 below shows these shifts:



Among the four factors, repetitiveness remains the most common. From 2005–2018, 81 percent of defendants committed violations involving conduct lasting more than a single day. Further, repetitiveness is almost always present when two or more factors are present. For defendants whose violations involve two or more aggravating factors, 97 percent engaged in repetitive violations. The prevalence of repetitiveness, however, should not detract from the importance of the remaining three factors: environmental or public health harm, deceptive or misleading conduct, and operating outside the regulatory system. In the past, I have concluded that prosecutors focus primarily on conduct involving these three factors, and that while prosecutors tend to charge cases involving repetitive violations, repetitiveness alone rarely merits criminal charges. Our most recent data continues to support this conclusion. Just 7 percent of defendants committed violations that only involved repetitiveness as a factor, and only 11 percent of defendants committed violations that did not involve at least one of the three other factors.

By comparing the presence of aggravating factors across administrations, we see slight fluctuations in the pervasiveness of each of the factors. Though repetitiveness continues as the most common of the factors, the percentage of defendants has lowered slightly during the first two years of the Trump administration. On the other hand, deceptive or misleading conduct has increased slightly during those two years. Given the small size of this shift and the limited number of cases prosecuted under President Trump, it probably is too soon for us to draw any meaningful conclusions from this data.

It merits emphasis, however, that the small shifts we see during the Trump administration appear to have begun before President Trump took office. The decline in the percentage of prosecutions involving repetitive violations began in 2014 during the Obama administration, while the percentage of prosecutions involving deceptive conduct began increasing in 2013. By 2016, deceptive conduct was almost as common as repetitiveness, with 75 percent of defendants being involved in deceptive conduct. The rise in defendants involved in deceptive conduct may indicate a general shift towards prosecuting conduct more traditionally thought to be criminal regardless of whether it involves an environmental component. We will continue to monitor these subtle annual shifts, which are shown in Figure 10 below:



Overall, our latest data allows us to conclude again that nearly all defendants in criminal environmental prosecutions engage in conduct involving at least one of the aggravating factors, with most violations involving multiple aggravating factors. While the initial data from the Trump administration shows slight deviations from that of the Bush and Obama administrations, we cannot yet draw any firm conclusions about whether or not these changes are significant, or if they indicate changes in the ways that prosecutors exercise discretion when charging an environmental crime. Importantly, however, our early data suggest that prosecutors continue to exercise their discretion to reserve criminal charges for cases involving one or more of the aggravating factors.

CONCLUSION

In this article, I have considered for the first time shifts in pollution prosecution levels across administrations. I have done so reluctantly, because I was trained as a young prosecutor that politics have no place in law enforcement decisions—and during my long tenure at the Justice Department, I saw political appointees from a wide range of ideological backgrounds show non-partisan support for pollution prosecutions. Despite the serious shortcomings of the Trump administration from an environmental protection standpoint, I expected that President Trump’s record would not be different from prior Republican administrations that had less than stellar environmental policies—most notably President Bush—yet strongly supported the environmental crimes program.

During the first half of the Trump administration, however, pollution prosecutions dropped in alarming fashion, unlike any decline that occurred across the 14 years of data analyzed by the Environmental Crimes Project. Indeed, in the 30 years that I have had a front row seat to the federal environmental crimes program—including 17 years as an environmental crimes prosecutor and 13 years conducting research and teaching about pollution crimes—I have never seen case numbers drop the way they have during the first two years of the Trump administration. As our data makes clear, the decline is particularly troublesome in the area of Clean Water Act prosecutions, which has always been the leading environmental statute for criminal enforcement, yet all but disappeared by the second year of the Trump administration. Clean Air Act cases also plummeted.

Perhaps there are explanations for the sharp decline in environmental criminal enforcement during the first two years of the Trump administration and, when we have the opportunity to review data for 2019 and 2020, we will see a resurgence in pollution prosecution levels. That appears unlikely, based on data from the EPA website for fiscal years 2019 and 2020, which suggests that the historically low levels of pollution prosecution have persisted throughout the Trump administration. No matter what the future holds, the data from the first two years under President Trump reveals a dramatic departure from the non-partisan support for pollution prosecutions that had existed across administrations, which leaves Americans less safe and the environment less protected.